IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33711

IN RE: FLOOD LITIGATION

Raleigh County Civil Action No. 02-C-797
Upper Guyandotte River Watershed
Subwatershed 2a

WEST VIRGINIA FLOOD LITIGATION
DEFENDANTS' AMICUS CURIAE BRIEF

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Liaison Counsel for Defendants

Dated: January 22, 2008

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I. INTRODUCTION

NOW COME Your Amicus, all of whom are currently defending claims in the Mass Flood Litigation,[1] by the undersigned Liaison Counsel,[2] pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, and respectfully submit this amicus brief. These Amicus have a six-year vested interest in, and will be directly affected by, any opinion rendered in the two appeals currently pending regarding the Honorable John A. Hutchison's ("Judge Hutchison") decision to grant the *Renewed Motion for Judgment as a Matter of Law or a New Trial* filed by Western Pocahontas Properties Limited Partnership and Western Pocahontas Corporation (collectively "Western Pocahontas"), Appellees herein, at the conclusion of the Oceana/Mullens Phase I Trial.

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[1] This Honorable Court granted these parties leave to file an amicus curiae brief by Order entered 6 December 2007. For a list of the defendants currently defending claims in the West Virginia Flood Litigaiton, see list entitled *In Re Flood Litigation* Defendants, attached as Exhibit A.

[2] By Order entered 30 October 2002, Judges Johnson, Recht, and Hutchison appointed attorneys representing certain of the parties to act as Liaison Counsel to be "a conduit and contact point for general, global coordination and communication among the Court, defense counsel as a group and plaintiffs' counsel as a group." See First Flood Litigation Case Management Order at 2. Thus, as Liaison Counsel appointed for the defendants, Jackson Kelly PLLC coordinated the effort of preparing, finalizing, and filing this brief.

After painstaking consideration of the facts, evidence, and arguments before him, Judge Hutchison correctly entered judgment in favor of Western Pocahontas, and his ruling should be upheld by this Honorable Court. Accordingly, these Amicus join, adopt, and incorporate herein by reference those arguments asserted by Western Pocahontas in support of affirming Judge Hutchison's decision. Furthermore, because the decision in the pending appeals will impact all those who use, and thus "disturb," the land and will dramatically affect the future of the extractive industries in West Virginia,[3] it is important that Your Amicus' views be brought before this Honorable Court for consideration.

The legal quagmire that is commonly referred to as the West Virginia Flood Litigation is the kind of litigation that has attracted negative attention to our state, whether deserved or not.[4] No other state has allowed litigation to proceed whereby a land-user has been sued for flood damages merely because he disturbed his land, thereby possibly increasing the peak flow of water leaving his property

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[3] Since this litigation was begun, "copy-cat" cases have been filed after other extraordinary, but more localized, rain events in southern West Virginia and one expects this will continue. Certainly heavy rains will continue to occur. See List of Lawsuits Alleging Damages Related to Flooding On Dates Other Than 8 July 2001, attached as Exh. B.

[4] Witness our most recent national review:

> On July 8, 2001, a flood destroyed about 3,500 buildings in six counties south of Charleston. In some places, such devastation is called an "act of God." In West Virginia, personal injury lawyers consider it an "act of corporation."

Judicial Hellholes 2007 at 13. The American Tort Reform Foundation recently ranked West Virginia 4th among its list of "Judicial Hellholes," in part because of its perception that West Virginia permits "lawsuits . . . with extraordinarily low standards for massive actions that combine many plaintiffs and defendants in a single lawsuit, and by adopting theories of liability that are out of the mainstream and particularly favorable to plaintiffs." Id. at 11.

that may have minutely contributed to flooding at some location downstream, even though the flooding would have occurred regardless of whether the land upstream had ever been disturbed at all. In other states, such an event would be the focus only of scientific study, but in West Virginia it has precipitated more than six years of enormously costly and time-consuming litigation. Fortunately, however, decisions carefully delineating the insufficiency of both the Plaintiffs' pleadings and their supposed proof are currently before this Honorable Court, presenting the opportunity to curtail this litigation.[5] Accordingly, Your Amicus respectfully submit this brief in an effort to give this Honorable Court a sense of the Herculean efforts expended to bring this litigation to its current procedural posture and why the premise driving the Flood Litigation is an illogical aberration that should be repudiated on policy, substantive, and procedural grounds.

II. GENERAL BACKGROUND ON HOW WE GOT HERE

On 8 July 2001, massive storm systems inundated southern West Virginia, causing flood waters to overflow the banks of hundreds of small creeks and streams and several major waterways, including the Coal River, Tug River, Guyandotte River and Kanawha River. Consequently, widespread flooding occurred in the counties of Boone, Fayette, Kanawha, McDowell, Mercer, Raleigh

[5] Currently, three appeals are pending before this Honorable Court in relation to the Flood Litigation. Two appeals (Appeal Nos. 33710 and 33711) pertain to the Upper Guyandotte River Watershed Plaintiffs' appeals of Judge Hutchison's decision. The third appeal (Appeal No. 33664) pertains to the Coal River Watershed Plaintiffs' appeal of Judge Recht's decision to dismiss their claims for failing to state a claim upon which relief can be granted.

and Wyoming. The intensity and volume of the rain must not be underestimated. As Judge Hutchison acknowledged, "[t]he storm event was significant by all accounts and by certain testimony, it was described as unprecedented, epic and perhaps even diluvian." 15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial ("Hutchison Order") at 8. In some locations it rained as much as five inches in a few hours.[6] Estimates of the storm frequency at trial ranged from a hundred-year to more than a thousand-year storm depending, on the location.[7] Given that on average, a stream is naturally expected to exceed its banks if it receives runoff from a more than two-year frequency storm, it is not surprising that such widespread flooding occurred.[8] Simply put, it flooded a lot because it rained a lot. Moreover, because it rained a lot, the resulting flooding was inevitable and would have occurred in disastrous proportions regardless of anything done or not done on the land by man.[9]

Starting with suits filed within days of July 8th, thousands of Plaintiffs represented by The Calwell Practice, McGraw Law Offices, and James F.

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[6] See Flood Advisory Technical Taskforce Runoff Analysis of Seng, Scrabble, and Sycamore Creeks ("FATT Report"), June 14, 2002, Table Two at pg. 76 of Plaintiffs' Tr. Exh. 71.

[7] Joseph P. Sobel, Ph.D., Director of Forensic Services for AccuWeather, testified at trial that the 8 July 2001 storm was greater than a 1000-year storm event in the Oceana/Mullen area. Tr. Trans. at pg. 3141.

[8] The National Flood Frequency Program (USGS).

[9] See Mary Catherine Brooks, July 8, 2001 Flood Remains Worst Disaster in Local History, The Register Herald, June 29, 2006, at http://www.register-herald.com/archivesearch/local_story_180204647.html.

Humphreys & Associates (collectively "Calwell Plaintiffs") sued more than two hundred defendants (primarily landowners, timber owners, mining companies, and logging companies) claiming that their use of their land contributed to the July 8th flooding in southern West Virginia. Additionally, The Segal Law Firm, on behalf of approximately 75 Plaintiffs ("Segal Plaintiffs"), sued Western Pocahontas, asserting claims related only to flooding in the Mullens Subwatershed of the Upper Guyandotte Watershed.

The Calwell Plaintiffs filed a motion in the Circuit Court of Fayette County, West Virginia, seeking to refer the seven flood cases then pending before seven West Virginia Circuit Courts to the Mass Litigation Panel. By Administrative Order entered on 16 May 2002, this Honorable Court granted the motion to refer, and by Administrative Order entered on 13 June 2002 transferred the cases to the Circuit Court of Raleigh County. Thereafter, the Honorable Judges Gary L. Johnson ("Judge Johnson"), Arthur M. Recht ("Judge Recht"), and John A. Hutchison (collectively "Panel Judges") were assigned to oversee the Mass Flood Litigation. Eventually, a total of 56 cases had been transferred as of 2005.[10] The Panel Judges organized the proceedings geographically by major watershed.[11] The litigation in all watersheds involves the same legal issues, and

[10] In 2007, the Calwell Practice filed nine new cases asserting claims premised upon 8 July 2001 flooding. See List of 2007 Lawsuits Alleging Damages Related to 8 July 2001 Flooding, attached as Exh. C

[11] The Mass Flood Litigation involves 6 watersheds: 1) Coal River Watershed; 2) Tug Fork Watershed; 3) Upper Guyandotte Watershed; 4) Upper Kanawha Watershed; 5) Lower New

the allegations set out in all of the Complaints and Amended Complaints filed by the Calwell Plaintiffs are entirely generic and essentially identical. Judge Hutchison is in charge of litigation in the Upper Guyandotte Watershed, Judge Recht the Coal River Watershed, and Judge Johnson the Tug Fork Watershed.

From the start, the Plaintiffs argued that their case was premised mainly upon strict liability. The Panel Judges decided initially to certify the legitimacy of that theory, as well as several other legal issues, to this Court. In the context of these certified questions and the issues decided that have impacted the subsequent course of this litigation, the most important question was whether strict liability was cognizable. This Honorable Court found:

> Defendants are not strictly liable for their activities or the conditions their activities create. This Court simply does not believe that the day to day activities of Defendants necessarily create a high risk of flash flooding. Also, we are convinced that any increased risk of flooding which results from Defendant's extractive activities can be greatly reduced by the exercise of due care. In addition, extractive activities such as coal mining and timbering are common activities in southern West Virginia. Finally, we are unable to conclude that the great economic value of some of these extractive activities, such as coal mining, is outweighed by their dangerous attributes. Accordingly, we answer question 4, as reformulated, in the negative.

In Re Flood Litigation, 216 W.Va. 534, 545, 607 S.E. 2d 863, 874 (2004).

From the outset of this entire litigation, the defending parties have been faced with the same obstacles in regard to the Calwell Plaintiffs' Complaints and Amended Complaints: they do not specify which Plaintiffs are suing which

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Watershed; and 6) Upper (Middle) New Watershed. Only the first three watersheds have been assigned to a specific Panel Judge to date.

specific defendants, which particular operations are at issue in each instance, and what, if anything, about the conduct of any specific operation distinguishes it from other land-disturbing activities and produces liability. In fact, the allegations are entirely general and generic. Thus, on their face, the Calwell Plaintiffs' Complaints and Amended Complaints only arguably state a claim under strict liability because they at base allege only that defendants engaged in land-disturbing activities (mostly timbering and mining) and that such activities contributed water to the flooding. The trial under review shows they cannot prove even that.

After this Court determined that strict liability did not apply, Plaintiffs simply pursued the same strict liability allegations under the *nom de plume* of "nuisance." Judge Hutchison repeatedly advised Plaintiffs' counsel that they were still really speaking strict liability and that the defendants were entitled to know more than that they were being sued because they were coal and timber companies. By Order entered on 30 September 2005, Judge Hutchison ordered as follows:

> On or before October 31, 2005, each Plaintiff located in the Upper Guyandotte River watershed will identify, to the best of his/her ability, each defendant against whom he/she is asserting a claim, and each particular active holding and/or operation of such defendant, as of July 8, 2001, that he/she contends caused him/her damage as a result of the July 8, 2001 flood event.

Subsequently, by Order entered on 11 January 2006, Judge Hutchison granted the defendants' motions for a more definite statement and ordered that on or before 10 February 2006 each individual Plaintiff:

> . . . name each individual Defendant against whom recovery is sought including, but not limited to, 1) identifying the specific Defendant [sued] by each Plaintiff; 2) the specific operations or specific properties of the Defendant which each Plaintiff contends caused him/her harm; and 3) the activities in which the Defendant allegedly engaged to which the Plaintiffs' claims are purported to relate.

See Or. entered 11 Jan. 2006 at 4.

A hearing was held on 14 February 2006, at which time Plaintiffs moved for an extension of time to file the ordered disclosures. In extending their deadline to 20 February 2006, Judge Hutchison noted that Plaintiffs had failed to state "who is suing whom for what, and where and how did it happen?" See Or. entered 13 March 2006 at 5.

Also of note is that shortly before the first Phase I Trial, after the litigation had been pending for more than four-and-a-half years and the expenditure of significant defense costs, Plaintiffs decided that they would proceed to trial only against those defendants who owned the land; they dismissed those defendants who actually conducted land-disturbing operations on the land, bringing the number of defendants from 36 down to 15 in the Mullens Subwatershed, and from 37 down to 16 in the Oceana Subwatershed. This revelation was made shortly before Plaintiffs were obligated to comply with Judge Hutchison's Orders and

repeated admonitions requiring identification of which Plaintiffs were suing which defendants for what conduct and, in fact, that information was never provided. Instead, all the landowners knew as they went to trial was that they were being sued because the timbering and coal mining activities of others (now dismissed) on their property had disturbed the land. This was what Judge Hutchison and the remaining defendants faced in the Phase I Trial, and it is still what we all face today.

In the final analysis, after suffering through six-plus years of painfully difficult and time-consuming litigation, one thing is crystal clear: given their haphazard procedural and substantive approach to this meritless litigation, the West Virginia Flood Litigation Plaintiffs should not be permitted to further prosecute these "strict liability dressed as nuisance" claims that attempt to shift to the mining and timbering industries the cost of events that are an inevitable and unavoidable consequence of Mother Nature's course.

III. ARGUMENT

A. THE CONSEQUENCES OF FINDING PLAINTIFFS' "THEORY" VIABLE WILL BE DISASTROUS TO THE LAW AND TO THE PEOPLE OF WEST VIRGINIA.

The issues presented by this litigation, the implications of its ultimate resolution, and its overall importance to each and every citizen, business, and organization in West Virginia cannot be overestimated. The Plaintiffs in this matter seek to extend the bounds of civil liability beyond historical limits and into

uncharted and dangerous territory.[12] Acceptance of the Plaintiffs' position will make events "foreseeable" that will statistically never occur in several lifetimes and will endorse limitless and indeterminate liability that can be visited on every landowner and land-user, depending on where the heavy rain falls. Anyone who alters the West Virginia landscape in any way would be assessed a new level of liability exposure. This would stifle any activity requiring manipulation of the land and permanently impede economic progress throughout West Virginia.

It is self-evident that no person or business or government desires flooding. It is also self-evident that flooding – especially in the hills of southern West Virginia – cannot be avoided. Enormous efforts have been undertaken to try to minimize the adverse impact of significant storm events in southern West Virginia, but these efforts cannot be entirely successful so long as people choose to live and work in the hollows and valleys on the flood plains of our creeks, streams, and rivers whose very attractiveness consists of the characteristics that make "flood control" impossible. If you are in the flood plain and it rains enough, you will be flooded. Period.

Because coal, timber, and oil and gas are southern West Virginia's most abundant natural resources, the social utility of the industries that extract those resources is immense and undeniable. Their existence as an integral part of the economic landscape of West Virginia is essential. To force them to bear the cost of unavoidable natural disasters would destroy their economic viability.

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[12] See Section B.1. at pg 14-16 *infra*, for discussion of Plaintiffs' "theory" of liability.

These industries pay for their coal rights, timber rights, land rights, business licenses, taxes, and so on. They provide jobs and economic health to our state. Their resources, like other citizens' resources, have been used by government to try to improve flood resistance and reaction. If liability may be placed on the defendants in this litigation, West Virginia courts can expect to be inundated with claims against an unlimited class of defendants -- and not just for floods, but for every undesirable by-product of a complex society that co-exists with a robust, unpredictable, and uncontrollable Mother Nature.

The citizens of southern West Virginia, individually and through federal, state, and local governments, have undertaken complex and costly flood control measures to ameliorate the devastating losses, often occasioned on a smaller scale and very infrequently on the scale of the 8 July 2001 floods, by natural flooding in the area. They have benefited from the United States Army Corps of Engineers' local protection projects, including earthen levees, flood walls, channelization, and stream bank protection[13] (all of which can help some and hurt others in particular circumstances); as well as the Bluestone Lake Dam, operational since 1949, and the R.D. Bailey Dam, under construction when the 1977 Flood Study was written, to name a few. See Report of the Citizens [sic] Committee on Flood Cause and Prevention to the West Virginia Legislature, January 1978, at pg. 32. As it did after 8 July 2001, the Federal Emergency Management Agency ("FEMA") also

[13] See generally, Amicus Curiae Brief filed on 7 January 2008 by these Amicus in relation to Appeal No. 33710.

has many programs to assist after the fact those who suffer the inevitable consequences of living or working in Mother Nature's flood zone.[14]

Short of removing all residences and businesses from flash-flood prone areas and from the flood plain, however, reasonable people have not been able definitively to agree upon any measures that will prevent intermittent flooding in southern West Virginia, and no one can predict or prevent or protect against the inevitable results of 100-1000 year storms like those of 8 July 2001.[15]

In 1985, West Virginia decided through its Legislature that it would expend revenues and resources to promote existing and new wood products and industries to produce employment and revenue. See W. Va. Code §§ 19-1A-1 & 19-1A-2. Through the Forestry Development Act of 1987, the state created the Forest Management Review Commission to "assist in the retention, expansion and attraction of forestry and forestry related industries by creating a climate for the development and support of the industry." See W. Va. Code §§ 5-24-1 et seq. In West Virginia Code § 22A-7-2, our Legislature announced that "[t]he continued

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[14] For a review of the assistance provided by FEMA as a result of the 8 July 2001 flooding, see http://www.fema.gov/news/newsrelease.fema?id=6463.

[15] For example, while many West Virginia residents cry out for dredging, see Sam Tranum, "Fills & Spills -- Residents blame silt, dirt for filling streams that overflow," Charleston Daily Mail, Thursday June 13, 2002, the West Virginia Soil Conservation Agency has determined that dredging is often harmful to highly dynamic watercourses, see "Flooding Issues in West Virginia, Dredging and Flood Control" at http://www.wvwrc.org/flood_ctrl.htm. While historians, environmentalists, and recreationists, recalling the complete deforestation of West Virginia culminating in the early 1900s, decry the devastation of clearcutting, see Ken Ward, Jr., "Timber Boom Brings Questions," Sunday Gazette-Mail, September 8, 1996, foresters recommend clearcutting or "even-aged management" as a method of increasing timber quality, which deteriorated with "selection management," see Kevin Belt, R.F., and Robert Campbell, R.F., Consulting Foresters, "The Clearcutting Controversy–Myths and Facts," West Virginia University Extension Service at http://www.wvu.edu/~agexten/forestry/clrcut.htm.

prosperity of the coal industry is of primary importance to the State of West Virginia," and in West Virginia Code § 22C-8-1(a)(2), it was declared to be the public policy of this state to "foster, encourage, and promote the practical exploration, development, production, recovery and utilization of this State's coal and gas . . . ." Countless other statutes provide inducements, such as tax incentives, for the timber industry and other extractive industries to operate in West Virginia. To allow the civil liability tort system to assess enormous new risk and indeterminate cost on the very industries this state has worked so diligently to attract is a contradiction of monumental proportion.

B. MAKE NO MISTAKE, IT HAS TAKEN AN INCREDIBLE AMOUNT OF TIME, EFFORT, MONEY, AND HARD WORK ON THE PART OF THE PANEL JUDGES AND DEFENDANTS ALIKE TO REACH THIS JUNCTURE AND STAND BEFORE THIS HONORABLE COURT IN SUPPORT OF THE RULINGS ISSUED.

The "procedural history" set out by the Calwell Plaintiffs would lead one to believe that very little has happened since they initiated the Mass Flood Litigation days after the 8 July 2001 flooding. Such an impression would be wrong. The vast number of pleadings, motions, and briefs filed, hearings held, and orders/rulings issued stand as a testament to the massive and arduous effort that has led us to this juncture. Since this action was referred to the Mass Litigation Panel, approximately **1,700** docketed filings have been made, **24** hearings held, **88** Orders entered (three of which required a Table of Contents due to the number of

issues addressed and their length),[16] and a **6-week** Phase I Trial conducted. Moreover, countless hours have been spent by the defendants and their counsel (separate and apart from drafting filings and preparing for and appearing at courtroom proceedings) formulating and executing strategies in an effort to understand and respond to the panoply of unprecedented issues and practical problems raised by this litigation.

Without question, the Panel Judges and the defendants have worked incredibly hard trying to obtain clarification of Plaintiffs' claims so they could address them in some meaningful and efficient fashion. The Plaintiffs, in response, have failed even to figure out who each Plaintiff is suing and why, let alone how to prove their claims against the scores of defendants that they have hauled into Court.

1. If "Disturbing" Your Land Makes You Liable, Who Among Us Can Cast the First Stone?

Stated in its fundamental terms, Plaintiffs' "theory" is this: any entity which 1) leases its land to another who conducts or conducted in the past, or 2) contracts with another who conducts or conducted in the past, or 3) conducts or conducted in the past lawful activities in a lawful manner on its land may be held liable for damages to any and all property located downstream that is caused by flooding due to a rainfall event if its use or permitted use by another of its land causes any increase in peak flow or peak runoff of water from its land as a result of that

[16] This number is limited to only those Orders that impact all parties to the litigation and does not include the multitude of Orders entered in relation to issues raised by individual defendants.

rainfall event over what would have occurred if its land had remained undeveloped and undisturbed and unchanged by man from its original native condition.

Even assuming Plaintiffs' could prove it, which the trial under review shows they cannot, Plaintiffs' "theory" of liability as just stated does not fall within the confines of any recognizable tort action (other than strict liability), and taken to its natural conclusion illustrates the extent to which the Flood Litigation has and will run amok. If the Plaintiffs' hypothesis is correct, every homeowner, every corporation, every municipality, every golf course, every shopping center, every religious denomination, every school board, in effect, anyone and everyone who owns land that has been disturbed (meaning developed in any way) or who contracts for or conducts activities resulting in land disturbance upstream from a Plaintiff is liable to that Plaintiff for flood damages. Who among us owns property that is pristine, untouched, and free from man's use or development?[17]

Given their theory of recovery, why haven't all of the Plaintiffs who are located upstream from their brethren also been named as defendants? The Plaintiffs' homes, garages, storage buildings, driveways, swimming pools, gardens, floodwalls, etc., have all likely increased the peak flow of water leaving their properties during a storm event, and under the Plaintiffs' "theory of liability,"

[17] If any of the Mass Flood Litigation claims are permitted to proceed in the lower court, then issues related to dismissal for failure to join necessary parties may be a battle that must be fought. The defendants whom Plaintiffs have selectively sued have thus far resisted the urge to expand the litigation to others because we see no "fault" upon anyone for such an obviously overwhelming act of nature. If Plaintiffs' "theory" is correct, though, no owner or user of land can avoid such claims.

they too are liable to anyone downstream of them who has suffered flood damage to which that "excess" runoff contributed.[18] But lest we forget, there is an important caveat to the Plaintiffs' theory of liability: only those that are in some way tied to the extractive industries (coal, timber, oil and gas), either by way of owning the property on which the extraction occurs or by conducting the operations that accomplish the extraction, should be held liable for flooding. But where and how can any court draw a logical line between one land disturbance and another under Plaintiffs' theory?

The absurdity of the Plaintiffs' theory and selectively targeted defendant pool is trumped only by their continued and flagrant disregard for orders of court and the rules that govern civil litigation, most particularly the West Virginia Rules of Civil Procedure. The most glaring example of this is Jacqueline Hale, et al., v. Black Wolf Mining Company, et al., the only case filed by the Humphreys' Plaintiffs. Believe it or not, the procedural foundation for the legitimacy (or not) of the claims of all the Humphreys' Plaintiffs – including those in the Mullens Subwatershed – rests on the history set out below. The Hale case epitomizes the procedural inadequacies and irregularities that plague the Mass Flood Litigation, forcing the defendants and Panel Judges alike to spend incredible amounts of time (and for the defendants, money) in a vain attempt to figure out how to respond to and defend against this quagmire of generic muck created by the Plaintiffs.

[18] Counterclaims have not yet been permitted by the Panel Judges, but they will come asserting contributory negligence, estoppel, assumption of the risk, etc., as well as liability to other Plaintiffs downstream.

2. Which of Our Rules, or Any Combination Thereof, Permits Plaintiffs to Name Scores of Defendants Located in Eleven Different Counties, Spanning Two Different States, All in One Pleading, Or Permits Those Same Plaintiffs to Prosecute Claims Asserted in a Complaint Never Served on Any Defendant?

Prior to these claims being referred to the Mass Litigation Panel, Jacqueline Hale ("Plaintiff Hale") filed suit against a handful of defendants asserting a class action on behalf of those who had suffered flood damage and other injuries on 8 July 2001 in the counties of McDowell, Boone, Fayette, Greenbrier, Kanawha, Mercer, Nicholas, Putnam, Raleigh, and Wyoming, West Virginia, and Buchanan County, Virginia. See Or. Hale Compl.

The Original Hale Complaint was filed on 29 April 2002 in McDowell County, Civil Action No. 02-C-90-M, naming **1 Plaintiff** and **14 defendants**. Shortly thereafter, the Original Hale Complaint was forwarded to the Mass Litigation Panel. Though the Original Hale Complaint was not specifically referred to this Court's Referral Order, it was swept up with the others because it asserted damages from flooding on 8 July 2001. See Admin. Order entered 16 May 2002; see also, 10 September 2002 Correspondence from Acting Chief Justice Starcher.

Incredibly, the Hale Plaintiffs never served the Original Hale Complaint on any of the defendants. Two years passed, and on 26 April 2004, Plaintiff Hale filed a motion for leave to amend the Original Hale Complaint to add new Plaintiffs, new defendants, and new claims. Though that motion was never

noticed for hearing and the Panel Judges never granted her permission to do so, Plaintiff Hale also filed a pleading entitled "First Amended Complaint" ("Hale Amended Complaint") on 28 April 2004. Like the Original Hale Complaint, however, the Hale Amended Complaint was never served on any defendant, nor was any attempt made to serve it on any defendant, to the best of your Amicus' knowledge. Where does our Mass Litigation Panel or any other Rule dispense with the requirement of timely service?

In September 2005, more than four years after the 8 July 2001 floods, Plaintiff Hale filed yet another motion to amend the Original Hale Complaint. Leave to amend their four-plus year old complaint that had never been served on anyone was granted,[19] and on 30 September 2005 Plaintiff Hale filed – and later actually served – a pleading entitled "First Amended Complaint" ("First Amended Hale Complaint"). The First Amended Hale Complaint asserted the same generic claims on behalf of **483 Plaintiffs** (482 of whom were not named in the Original Hale Complaint) and against **128 defendants** (114 of which were not named in the

[19] In the Panel Judges' defense, motions raising this issue regarding Hale were simply trampled under the feet of all the other motions and matters pending before them, and there was not time to adequately address them; no substantive ruling on Hale was made in particular, but all were granted leave to amend. In any event, the allegations asserted in the original Complaints were general and generic, and the Plaintiffs made no attempt to shed light on their claims in their Amended Complaints. See 30 September 2005 Corrected Order Dismissing Class Action Allegations and Granting Plaintiffs' Motion for Leave to Amend Their Complaints.

Original Hale Complaint) in all six major watersheds.[20] See First Am. Hale Compl., ¶¶ 8-9, 29.

Adding to this rapidly growing list of infirmities, none of the Hale Plaintiffs bothered to identify which Plaintiffs are suing which of the 128 named defendants and why in either their Original or Amended Complaints. Accordingly, none of the defendants know in which watersheds they are defending claims, which becomes incredibly problematic given the width and breadth of the Hale Plaintiffs' suit, which spans 11 counties and two states, thereby implicating all six watersheds at issue.

Practically speaking, as a defendant, which watershed proceeding(s) do you participate in and attend when you don't know which Plaintiffs, if any, have filed suit against you in which of the six involved? Answer: All of them. Consequently, many defendants have racked up countless hours and huge legal fees in response to nothing more than phantom claims. How can this "procedure" possibly be deemed to comply with our rules and due process? If there were real claims here, they should have been raised in separate complaints by specific Plaintiffs asserting specific facts against specific defendants. Nothing in our rules allows these cases to be filed as they have been, and everything in our jurisprudence cries out against the slipshod, generic, industry-wide way they have been pursued.

[20] The First Amended Hale Complaint also included generic pleadings asserting claims spanning all 6 watersheds, in 11 different counties, in 2 different states.

3. Class Action Allegations Asserted by Flood Litigation Plaintiffs Who Never Intended to Seek Class Certification Do Not Toll the Applicable Statute of Limitations.

Many of the original Complaints filed in the Flood Litigation included class action allegations in what Plaintiffs' Counsel Stuart Calwell termed a "kitchen sink" approach to pleading. See 25 Feb. 2005 Hr. Trans. at 62-3. However, Plaintiffs' intention not to seek class certification was evident as early as the Spring of 2002 when Judge Johnson held a hearing to determine whether the July 8th flood claims should be referred to the Mass Litigation Panel. In making his report to this Honorable Court, Judge Johnson recommended that class certification "be ignored as a possibility" (emphasis added) because "[n]either party advanced theories on the issue of whether these [cases] would be Class Actions under Rule 23." Adm. Or. entered 16 May 2002 at pg. 3. Surely, if the Plaintiffs had intended to pursue class certification, they would have raised that issue during the hearing before Judge Johnson or upon entry of the 16 May 2002 Administrative Order. Yet no mention of class certification or effort to seek class certification was ever made.[21]

Fast forward three years, and the Plaintiffs agreed to voluntarily dismiss all class action allegations. See Corrected Order Dismissing Class Action Allegations and Granting Plaintiffs' Motions for Leave to Amend Their Complaint entered on 30 September 2005. The Plaintiffs then asserted in their Amended Complaints

[21] Moreover, these claims could not possibly meet any test for class certification.

new claims against new defendants on behalf of new plaintiffs, even though the flooding at issue had occurred more than four years earlier. Some "Amended" Complaints "consolidated" earlier complaints – all of them containing the same entirely generic allegations as originally asserted. Defendants who had been sued in one county were now sued in 11 (10 counties in West Virginia and 1 county in Virginia); defendants who had never been sued now were; defendants who had been named by a few Plaintiffs were now named by a few thousand. In their Amended Complaints, the Calwell Plaintiffs added **1,853 new Plaintiffs** to this litigation, as well as **31 new defendants**. In response to the Amended Complaints, the defendants moved to dismiss (in various combinations) themselves, Plaintiffs, new Plaintiffs, and/or claims, all based on the applicable statute of limitations. Plaintiffs, in turn, claimed that the statute of limitations was tolled by their having included in the original Complaints class action allegations which they immediately abandoned and never pursued!

Relying upon American Pipe v. Utah,[22] a decision that has not been adopted by this Honorable Court, the Panel Judges held that the inclusion of class action allegations had tolled the applicable statute of limitations until 30 June 2005.[23]

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[22] 414 U.S. 538 (1974).

[23] The class action allegations were initially stricken from the Complaints pursuant to an Order entered 30 June 2005. The Corrected Order entered 30 September 2005 reflected that the Plaintiffs intended to voluntarily dismiss the class action allegations, as opposed to having them stricken from the pleadings.

See Order Regarding the Various Matters Considered at the December 19, 2005 Hearing, entered on 11 January 2006, at pg. 1.

So we begin with the unauthorized and completely indiscriminate lumping of multiple Plaintiffs and multiple defendants in the same generic Complaints and after four years of trying unsuccessfully to clarify the mess thus created enhance it by adding nearly two thousand new parties and claims but no new information.

These are the kinds of procedural nightmares born of the Mass Flood Litigation, and these are the kinds of battles that the defendants have waged day in and day out. How can this possibly be deemed fair and just to the defendants? How can this be held to comply with our rules and procedures? The answers (evident in Judge Hutchison's decision reached after presiding for years with extraordinary thoughtfulness, patience, and politeness over unprecedented litigation) are that it can't. And that is why it is imperative that this Honorable Court affirm the hard-thought decisions before it which will hasten the Mass Flood Litigation toward the natural death of which it is so deserving.

C. WITH HINDSIGHT COMES CLARITY, AND SIX YEARS OF LITIGATING CLAIMS RELATED TO THE 8 JULY 2001 FLOODING PROVES BEYOND DOUBT THAT IT IS TIME FOR THE WEST VIRGINIA FLOOD LITIGATION TO COME TO AN END.

The Phase I Trial commenced in March of 2006 and ended six weeks later. By then, only Western Pocahontas remained. Ultimately, however, it was all for naught, because just as the Calwell Plaintiffs had asserted generic, vague, and ambiguous allegations in their Complaints and Amended Complaints, they

likewise proffered generic, vague, and ambiguous testimony in support of those claims. Their "experts" (who Judge Hutchison properly ruled should never have been qualified as such) premised their opinions upon generalized assumptions and conjecture, as opposed to relying upon data and evidence collected from and specific to Western Pocahontas' land.[24] What would have been unbearably speculative testimony as to operators was orders of magnitude more so when directed at a landowner. Conjecture would not have been enough regarding land-users, so it is not surprising that conjecture once removed was woefully insufficient as to a landowner. Likewise, Plaintiffs failed to proffer any evidence whatsoever in support of their position as to two of the three questions that were

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[24] Plaintiffs proffered testimony from two experts during the Phase I trial: 1) John Morgan ("Mr. Morgan") and 2) Dr. Bruce A. Bell ("Dr. Bell"). In granting Western Pocahontas' Motion for Judgment as a Matter of Law, Judge Hutchison premised his ruling largely upon the inadequacy of the Plaintiffs' expert testimony, finding, in part, that:

> Mr. Morgan testified that he ran a modeled program on SEDCAD that was not based on any particular area located in the Mullens Subwatershed or the Slab Fork Creek Watershed but was an analysis based upon a hypothetical area using certain assumptions selected by Mr. Morgan to be included in the model's computation. For example, Mr. Morgan assumed the humus depth, type of soil, existence or nonexistence of disturbed areas including log landings and roadways and other hypothetical criteria.
>
> The same models or the same type of computations were made by Dr. Bell as they relate to areas not in the Mullens Subwatershed, but nonetheless were performed to predict increases in surface flow based upon assumptions selected by Dr. Bell, and, in the case of both experts, as further limited by the parameters in the respective models.

15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 18 (emphasis added).

Moreover, Judge Hutchison determined that "[i]t is undisputed that, with regard to the model programs used by Dr. Bell and Mr. Morgan, where one varies the base assumptions that are put into the model, there will automatically be a resulting change in perceived impacts." Id. at 19. (emphasis added).

submitted to the jury.[25] Accordingly, upon reflection post-trial and with the benefit of more than four years of effort, Judge Hutchison ruled, *inter alia*, that the Plaintiffs had failed to meet their evidentiary burden[26] and authored a 46-page Order entering judgment as a matter of law in favor of Western Pocahontas. 15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial.

Claims have been brought over "flooding" allegedly caused by the acts of man for decades upon decades. With the sole exception of this "mass" proceeding and its clones that have since been filed after other disastrous but more localized extraordinary rain events,[27] however, each and every reported case before this Court premised upon flooding involved the claims of discreet plaintiffs against discreet defendants on clearly stated theories of liability and clearly pled specific facts and did not involve unprecedented storms over a huge geographic area flooding thousands of homes and businesses. Nobody had to "discover" who they were suing and why. See, e.g., McCormick v. Wal-Mart Stores, Inc., 215 W.Va. 679, 600 S.E.2d 576 (2004); State ex rel. Henson v. W. Va. Dept. of

[25] "[T]here is no evidence that these predictive models can be adapted and used in forensic applications to determine if a historic use of a given piece of real estate has caused inappropriate increases in peak flow during storm events." 15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 24.

[26] Judge Hutchison acknowledged that "[a] review of the Daubert case and its progeny clearly indicates that the use of assumptions, without connection to the facts in issue, is improper." 15 March 2007 Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or a New Trial at 24.

[27] In 2007, Stuart Calwell filed nine new cases asserting claims premised upon 8 July 2001 flooding. See List of 2007 Lawsuits Alleging Damages Related to 8 July 2001 Flooding, attached as Exh. B.

Transportation, 203 W.Va. 229, 506 S.E.2d 825 (1998); State ex rel. Phoenix Insurance Co. v. Ritchie, 154 W.Va. 306, 175 S.E.2d 428 (1970); Riddle v. B&O R.R., 137 W.Va. 733, 73 S.E.2d 793 (1952); Flanagan v. Gregory & Poole, Inc., 136 W.Va. 554, 67 S.E.2d 865 (1951); Lutz v. City of Charleston, 76 W.Va. 657, 86 S.E. 561 (1915).

These parties now appear before this Honorable Court again, seeking guidance and clarification. Importantly, this Honorable Court has something today that was absent before – the benefit of two years of strenuous effort by Judges Hutchison and Recht, and their respective decisions that flowed from that effort.

Hindsight is 20/20, and it is clear for all to see that Plaintiffs never had any claim other than strict liability. When the holdings in In Re Flood Litigation nullified the application of strict liability in this context, it equally nullified the bases for treating these cases together in the mass litigation arena, and the resulting quagmire ensued. Fortunately, this cloud has a silver lining. With hindsight comes clarity, and with clarity comes the ability to repair that which the passage of time proves to be broken. The principles of fairness and efficiency that govern referrals to the Mass Litigation Panel and invest its Judges with the responsibility to deal with the worst situations that can be thrown at our civil justice system now demand that the hard-earned and well-reasoned decisions of those Judges be upheld.

IV. CONCLUSION

It is time for the chapter in West Virginia's legal precedent known as the West Virginia Flood Litigation to come to a close. If the Plaintiffs are permitted to proceed in the face of the decisions of Judges Hutchison and Recht, a new level of potential liability will be layered on anyone who alters the land in any way. If defendants' activities may give rise to liability, then all land use may give rise to liability. The construction of any new structure, including a home or other building, disturbs the land, alters the surface contours, and affects surface water runoff, potentially having the same alleged effect on flooding as is alleged with respect to the defendants' activities. If Plaintiffs' "theory" is accepted, every land alteration can lead to the imposition of liability for flooding. Included within the stranglehold of this limitless liability will be persons or entities creating or maintaining homes, roads, bridges, golf courses, ski resorts, parking lots, vegetable gardens, farms, and any other activity that in any way affects the landscape. For reasons of legality, policy, practicality, and economic stability, your Amicus respectfully urges this Honorable Court to affirm Judge Hutchison's ruling.

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